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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 403

MISSISSIPPI POWER & LIGHT COMPANY ET AL.,
Appellants,

vs.

CAPITAL ELECTRIC POWER ASSOCIATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

MOTION TO DISMISS APPEAL

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INDEX

MOTION TO DISMISS APPEAL 1

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE APPEAL 2

I. OPINIONS OF THE SUPREME COURT OF MISSISSIPPI 2

II. STATEMENT OF THE CASE 2

1. Preliminary Statement 2

2. The Act 3

3. Legal Status of Parties 3

4 The Record 4

5. The Facts 5

III. ARGUMENT 8

A. There Has Been No Impairment of the Obligations of a Contract 8

B. This Court Will Accept the Mississippi Court's Interpretation of Mississippi Statutes 13

C. Even If Appellant's Franchise and Street Lighting Agreement Had Been Effective As to the Disputed Area on the Effective Date of the Act, the Act Would Still Be Valid 17

D. There Was No Violation of the Fourteenth Amendment to the Constitution of the United States 21

E. Exclusivity of Service Rights in Disputed Area 22

F. Authority of Administrator of Rural Electrification Administration to Make Loans 23

G. Appellant's Authorities and Argument 25

CONCLUSION 27
CERTIFICATE OF SERVICE 28
Appendix 1—Opinion of the Court in the case of *Capital Electric Power Association* v. *Mississippi Power & Light Company et al.*, 150 So.2d 534 ..... A1
Appendix 2—Opinion of the Court in the case of *Delta Electric Power Association* v. *Mississippi Power & Light Company et al.*, 149 So.2d 504 ..... A15
Appendix 3—Sections 1, 4, 5, 6, 22, 26 and 28 of Chapter 372, *Mississippi Laws of 1956* (Sections 7716-01, 7716-04, 7716-05, 7716-06, 7716-22, 7716-26 and 7716-28, Volume 6 Recompiled, *Mississippi Code of 1942*) A35

CASES CITED

Albertson v. *Millard*, 345 U.S. 242, 73 S. Ct. 600, 97 L. ed. 983 (1953) 16
Capital Electric Power Association v. *Mississippi Power & Light Company*, 240 Miss. 139, 125 So.2d 739 10
Capital Electric Power Association v. *Mississippi Power & Light Company et al.*, 150 So.2d 534 ..... 2, 10
Delta Electric Power Association v. *Mississippi Power & Light Company et al.*, 149 So.2d 504 ..... 2, 11, 14, 20, 26
U. S. v. *Burnison*, 339 U.S. 87, 70 S. Ct. 503, 94 L. ed. 675 (1950) 16

OTHER AUTHORITIES

16 *C.J.S.*, Constitutional Law, Section 281 19
3 *Cyclopedia of Federal Procedure*, 3rd Ed., Section 6.14, pages 183-186 15
Mississippi Code of 1942, Vol. 3 Recompiled, Sections 3374-02, 3374-10 and 3374-120 26
Mississippi Code of 1942, Sections 3375, 3406 and 3376 26
Mississippi Code of 1942, Vol. 4A Recompiled, Section 5463 *et seq.* 4, 25
Mississippi Code of 1942, Vol. 6 Recompiled, Section 7716-01 *et seq.* 3, 4, 19, 25
Mississippi Laws of 1936, as amended, Chapter 184 ..... 4, 25
Mississippi Laws of 1956, Chapter 372 ..... 3, 19, 25

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MOTION TO DISMISS APPEAL

Appellee moves the Court to dismiss the appeal herein on the following ground:

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE APPEAL.

I. OPINIONS OF THE SUPREME COURT OF MISSISSIPPI

The case has not been officially reported, but is unofficially reported: *Capital Electric Power Association* v. *Mississippi Power & Light Company et al.*, 150 So.2d 534. Copy of the opinion appears as Appendix 1 hereto.

The opinion made frequent reference to parts of the opinion in another case of similar import (not officially reported, but unofficially reported: *Delta Electric Power Association* v. *Mississippi Power & Light Company et al.*, 149 So.2d 504) decided by the same court a short time before. A copy of the opinion in that case appears as Appendix 2 hereto.

II. STATEMENT OF THE CASE

1. Preliminary Statement

This case reached this Court by these steps: (1) Appellee, an electric utility, filed a petition for a cease and desist order against Appellant, another electric public utility, before the Mississippi Public Service Commission (Commission) alleging an unlawful invasion of Appellee's certificated service area by Appellant; (2) the Commission, after hearing, granted the cease and desist order; (3) Appellant appealed to the Chancery Court of the First Judicial District of Hinds County, Mississippi (Chancery Court), the intermediate court of appeals, and that court reversed the Commission's order holding that Appellant, not Appellee, was entitled to serve the area involved in the litigation (disputed area); (4) Appellee appealed to the Supreme Court of Mississippi (Mississippi Court) and that court reversed the Chancery Court

and reinstated and affirmed the cease and desist order of the Commission; and (5) Appellant appealed to this Court on alleged constitutional questions.

2. The Act

Prior to enactment of the Public Utilities Act of March 29, 1956 (Chapter 372, *Mississippi Laws of 1956*; Section 7716-01, *et seq.*, Vol. 6 Recompiled, *Mississippi Code of 1942*), herein called the "Act", electric public utilities were not regulated by the Commission or any other state agency on a statewide basis. That Act brought them under the exclusive original jurisdiction of the Commission for regulation in respect of all of their "intrastate business and property", subject to certain exceptions not material here (Section 7716-04, Vol. 6 Recompiled, *Mississippi Code of 1942*).

The Act recognized prior service rights and granted unto each electric utility upon timely application being made, and without proof that the public convenience and necessity would be served thereby, the right to a certificate of public convenience and necessity (usually called a "grandfather certificate") to continue serving the areas being served by it on and prior to the effective date of the Act. These certificates were provided for on an area basis, not a facility basis

Copies of Sections 1, 4, 5, 6, 22, 26 and 28 of the Act (Sections 7716-01, 7716-04, 7716-05, 7716-06, 7716-22, 7716-26 and 7716-28, Vol. 6 Recompiled, *Mississippi Code of 1942*) constitute Appendix 3 hereto.

3. Legal Status of Parties

Appellant and Appellee were each and both included in the definition of a "public utility" contained in the Act and each and both were made subject to the terms and

provisions of the Act and the jurisdiction of the Commission (Section 7716-01 and 7716-04, Vol. 6 Recompiled, *Mississippi Code of 1942*).

The parties may be further identified as follows:

1. Appellee is a Mississippi corporation organized and operating under and by virtue of Chapter 184, *Mississippi Laws of 1936*, as amended (Section 5463 *et seq.*, Vol. 4A Recompiled, *Mississippi Code of 1942*) and by the terms and provisions of said Act and its charter is vested with full, plenary and unrestricted authority to render electric service of every kind and character, residential, commercial, industrial and other, both within and without municipal and urban areas of all sizes.

2. Appellant is a foreign corporation organized and operating under the laws of the State of Florida but doing business in Mississippi in an area located generally in the western half of the state. While its charter is not in the record, nor has its authority under the laws of Florida been established in the record, it may be assumed for present purposes that its statutory and charter authority is substantially if not entirely as broad as that of Appellee.

This identification is given in view of Appellant's attempt before all tribunals, including this Court, to imply that there is some sort of difference (favorable to Appellant) in the legal status, rights and public responsibilities of the two utilities. Such is not the case.

4. The Record

By permission of the Mississippi Court, the original record in that court has been certified and sent up to this Court as the record on this appeal. The record is in twelve volumes. Volume I to XI, inclusive, consisting of 2073

pages, constitutes the record made before the Commission and by it certified to the Chancery Court as the record on appeal to that court; and by that court sent up to the Supreme Court of Mississippi as a part of the record on appeal to that court. Volume XII, consisting of 105 pages, is the record made in the Chancery Court which contains no evidence, the case having been tried in that court on the record made before the Commission.

For convenience, the record made before the Commission will be referred to herein in the usual way by the letter "R" followed by a page number, thus "R ....."; while the record made in the Chancery Court and wholly contained in Volume XII will be referred to by the abbreviation "Ch. R" with page number cited, thus "Ch. R ....".

NOTE: Inasmuch as the original record of the Mississippi Court is now on file in this Court (and was so filed before Appellee received a copy of the Jurisdictional Statement) and is not available to Appellee, it will be impossible for Appellee when referring to an exhibit herein to give "the page number at which the exhibit appears and at which it was offered in evidence" as required by Rule 40-2 of this Court; but in all other respects citations to the record will be in accordance with said Rule.

5. The Facts

Beginning in 1939, Appellee built lines in the disputed area (a rural area) and held itself out to the public as offering its services to all who wished them; actually served all persons desiring service and applying therefor; and it has continued to do so until this day (R 768, 769). The earliest actual service was July 24, 1944. Others were added in the 1940's and 1950's as need

arose. Lines were added as needed. Appellee now has fourteen services in the area, including residential, church and commercial (R 1231; Exh. 63).

Neither Appellant nor any other electric utility has ever served the disputed area or any part thereof (except for the two residential services on the extreme northern edge connected by Appellant for two of its employees before the Act was passed and which were "frozen" by agreement of the parties and the Commission's order of September 21, 1959, in Docket No. U-84, Appellee's "grandfather application", this being the method adopted by the Commission and applied in all cases to deal with one or more "stray" services of a utility located within the "grandfather service area" of another utility, the predominate server of the area) (R 768, 769).

During the period 1956-1959, at the suggestion of the Commission, the two utilities set about to "identify" as best they could service areas to which they would be entitled, respectively, under their established rights, including rights under Section 5(b) of the Act, the so-called "grandfather clause". They were able to reach full agreement in this respect, whereupon they made maps (by counties) identifying such areas, initialed the maps and filed them with the Commission. The pertinent map here was Hinds County (R 903-927; Exh. 17). That map identified the disputed area as an area to which Appellee had grandfather rights, and both utilities recommended that the area be certificated to Appellee along with its other service areas in seven counties of the State (R 908; Exh. 17).

Thus the two utilities were in full accord that the disputed area was in law and in fact "grandfather service area" of Appellee and should be certificated to it as such.

The disputed area had been claimed by Appellee as grandfather service area in its application, Docket No. U-84. At first Appellant filed a sort of generalized protest to Appellee's application in U-84 (no particular or specific objection with respect to the disputed area), but that protest was later withdrawn and the disputed area was certificated to Appellee without objection under the Commission's order dated September 21, 1959 (R 803; Exh. 11).

Appellant obtained a "grandfather certificate" under its application to the Commission, Docket No. U-44, issued November 19, 1959, in which its certificated service area was described by metes and bounds. It did not include any part of the disputed area.

March 25, 1960, the disputed area (with other areas) was annexed to the municipality of Clinton by expansion of the corporate limits of that city.

On May 16, 1960, Appellant built its distribution line into and through the disputed area along the principal street thereof a distance of 1775 feet. The line was built immediately across the street from Appellee's line then in service and duplicated Appellee's line all the way (R 929, 1231; Exh 63). Along this line Appellant installed five street lights, four of which were located directly across the street from street lights of Appellee which were then and are now in service (R 1231; Exh. 63; R 1235); and connected permanent service to the residence of C. M. Kelley where Appellee's service was already being rendered for construction purposes; and Appellant solicited other services in the area (R 929 and 1523).

Appellant did not obtain a certificate of public convenience and necessity from the Commission for such construction or services, nor did it obtain the permission of Appellee.

The asserted basis for the invasion of Appellant was that it had a franchise and a street lighting contract from the City of Clinton, both obtained in 1946 for a period of twenty-five years, and by their terms they extended to areas subsequently annexed to the municipality.

Appellee's facilities in the disputed area are in excellent condition and its service therein is and has always been excellent (R 755 and 769; Exh. 63; R 1231). Appellee is ready, able and anxious to serve all of the needs of the disputed area now and in the future (R 969).

Appellee's physical facilities in the disputed area are reasonably worth $5,801.00, not including "back-up facilities" (R 786; Exh. 10).

Appellee's revenue from the disputed area for the twelve month period October 1, 1959 to September 30, 1960 (the most recent twelve month period preceding preparation of data for the hearing before the Commission) was $2,461.25. It was estimated by Appellee's manager, from twenty years of experience as such manager, and an equal period of time of closely observing the development of this and other areas in the vicinity, that the annual revenue by 1965 would be approximately $10,000.00 (R 771; Exh. 9).

III. ARGUMENT

A. There Has Been No Impairment of the Obligations of a Contract

The Mississippi Court held that the rights granted unto Appellee by the State under the terms of the Act, as implemented by the certificate of public convenience and necessity issued to Appellee by the Commission, were not annulled or impaired in any way by annexation of

the disputed area to the City of Clinton; and that Appellee continued to have the right to serve said area under its certificate of public convenience and necessity under and subject to the terms of the Act and the jurisdiction of the Commission (although of course the municipality would have the right to regulate reasonably the manner in which Appellee's lines and appliances are constructed and maintained, subject to the original primary jurisdiction of the Commission over all services and facilities of public utilities under the Act).

It is apparent that the Act as so interpreted and applied does not constitute an impairment of the obligations of the contracts between Appellant and the City of Clinton (franchise for use of the streets and other public places and street lighting agreement) because:

1. Municipalities in Mississippi have no powers except those granted to them by legislative enactment under the police power. Unlike certain other states, municipalities are not granted any powers whatsoever under the Constitution.

2. The authority to grant franchises and provide for street lighting granted by the State to municipalities was limited to areas *within the municipal boundaries.* Thus the franchise granted by the City of Clinton to Appellant in 1946 and the street lighting agreement of the same year did not become effective as to the disputed area, if at all, until March 25, 1960, the date the disputed area was annexed to the municipality.

3. Meantime, March 29, 1956—four years earlier—the State in the exercise of its police power had, through legislative enactment, granted unto Appellee the right to a certificate of public convenience and necessity to provide all needed electric service to the disputed area, and

this right was implemented by actual issuance of the certificate of public convenience and necessity by the Commission on September 21, 1959, still a full year and a half before annexation of the area, but actually effective as of the date of the Act, March 29, 1956. In *Capital Electric Power Association* v. *Mississippi Power & Light Company*, 240 Miss. 139, 125 So.2d 739 (Mississippi, January 9, 1961), the Mississippi Court characterized such a certificate of public convenience and necessity as being ". . . in truth and in fact a franchise from the state."

4. The subsequent annexation by the municipality and a franchise and street lighting contract given by it, all effective (if at all) for the first time March 25, 1960, could not annul the prior legislative enactment and the certificate or franchise issued to Appellee pursuant thereto.

5. Therefore, viewed in the light most favorable to Appellant, and assuming *arguendo* that the contracts with the City of Clinton became effective March 25, 1960, it is apparent that on that date the City of Clinton had no power to grant the rights it attempted to grant for the State (Clinton's creator and sovereign) had already granted those rights to Appellee. Thus Appellant never acquired any rights under its contracts with Clinton insofar as the disputed area is concerned, and there were none to impair.

6. The Mississippi Court dealt effectively with this question in its opinion (150 So.2d at page 534) as follows:

> "It is finally contended on behalf of the appellee, Mississippi Power & Light Company, that to deny extension of the Company's municipal franchise and street lighting contract to the disputed area in this case would violate the impairment of contracts and due process clauses of the state and Federal consti-

tutions. Mississippi Constitution of 1890, Secs. 14, 16; U. S. Constitution, Art. I, Sec. 10, cl. 1; 14th Amendment. But that contention has also been answered in the opinion rendered in the Delta Electric Power Association case."

In the *Delta* case the franchise and street lighting agreement were obtained from the City of Winona in 1948, and the disputed area was annexed to that city in 1959.

Turning then to the opinion in the *Delta* case, we find the point disposed of in an unanswerable way in the following passages (149 So.2d at pages 513, 514):

"A municipality in Mississippi is a creature of the state. It has only such power and authority as may be granted to it by statute. Adams v. Kuykendall, 83 Miss. 571, 590, 35 So. 830 (1903). The powers given municipalities to grant utility franchises and the right to use their streets and public places are subject to legislative control. Miss. Code 1942, Rec., Secs. 3374-73, 3374-85, 3374-119, 3374-120, 3374-129. The same applies to the power to extend municipal boundaries. Code Secs. 3374-10 to 3374-16. Code Sec. 2780 gives power associations the privilege to construct their lines over public roads and lands subject to regulation.

"All of these statutes must be read together, and in the light of the subsequently enacted Public Utility Act of 1956. To the extent that the latter statute is inconsistent with any of the former's provisions, the Act modifies them. All were enacted under the police power of the state. Superior Oil Co. v. Foote, 214 Miss. 857, 59 So.2d 85, 844 (1952). We do not consider or decide any issues unnecessary for the decision of this case. We hold that expansion of the city limits of Winona into the disputed area, coupled with the franchise and street lighting contract from Winona to Company, did not supersede Delta's cer-

tificate from the Commission to serve the disputed area. That certificate was issued before the area was within the municipal limits. The city at that time did not have any jurisdiction or power over this territory. Its franchise and street lighting contract, at the time of their execution, could not preclude the legislature from exercising its plenary police power over areas then outside of municipalities, nor its power to control and regulate municipal activities.

"Municipal ordinances are necessarily local in their application. They apply only to the territory of the municipality by which they were enacted. They have no extraterritorial application, except when the sovereign gives them that effect. Anno., 13 Am. & Eng. Ann. Cas. 136 (1909).

"A municipality's power over its streets is derived from the state, which has plenary control over them, including the right to grant the use of streets to others. Southern Bell Telephone & Telegraph Co. v. City of Meridian, 241 Miss. 678, 131 So.2d 666 (1961). Code Sec. 2780 granted that right to Delta in the disputed area long before the annexation. After that event, the governing body of a municipality has the right to regulate reasonably the manner in which Delta's lines and appliances are constructed and maintained, subject to the original, primary jurisdiction of the Commission over all services and facilities of public utilities under the 1956 Act.

"Appellees contend that to deny extension of the corporate franchise and street lighting contract to the disputed area would violate the impairment of contracts and due process clauses of both the State and Federal Constitutions. Miss. Const. 1890, Secs. 14, 16; U.S. Const., Art. I, Sec. 10, par. 1; 14th Amend. We find no merit in this position. It is based on the assumption that the franchise and street lighting contract, which were granted Company by Winona when the disputed area was not within the corporate lim-

its, vested in Company rights in that area, which was then outside of municipal limits. When they were executed by the city, no statute of this state authorized Winona to grant a franchise or street lighting contract to the disputed area, then outside the city. Winona's power was confined to its corporate limits. The city had no extraterritorial power of any kind to grant Company any rights in the disputed area when the contracts were executed.

"On the effective date of the Public Utility Act, and before the disputed area came within municipal limits, the legislature by that Act vested in Delta a right to receive for it a grandfather certificate. This was a valid exercise of the police power of the state. The municipal franchise and street lighting contract were not pre-existing rights as to the area involved in this suit, because before they could attach, if at all, the certificate issued to Delta by the Commission under the Act attached to the disputed area. There is no constitutional objection to this interpretation. On the contrary, to deprive Delta of the disputed area as a service territory would not only be contrary to the mandatory terms of the statute, but would also be violative of the certificate granted to it by the Commission. See Miss. Laws 1956, Ch. 372, Sec. 26(d) (scope of review)."

B. This Court Will Accept the Mississippi Court's Interpretation of Mississippi Statutes

This Court accepts the interpretation by a state court of last resort as to the meaning of state statutes. The Mississippi Court has clearly held that under Mississippi statutes a municipality of the state has authority to grant franchises and make street lighting contracts only in respect of area within the municipality; that its ordinances have no extraterritorial effect.

Applying this rule, the Mississippi Court has held that under the state statutes authorizing the City of Clinton

to grant the franchise to Appellant and enter into the street lighting agreement with Appellant (Appendices 6 and 7 to Jurisdictional Statement), notwithstanding the provisions in each making it applicable to annexed areas, that franchise and that agreement were wholly ineffective as to the disputed area which lay outside the municipality. This was because of a simple lack of statutory authority on the part of the municipality. That court further held, as is obvious, that if as between the parties, the city and the Appellant, the contract should be considered as becoming effective on March 25, 1960, the date the disputed area was annexed to the municipality, it nevertheless would avail nothing for Appellant because four years earlier, March 29, 1956, the state (the city's creator and sovereign) had granted unto Appellee the exclusive service rights in the disputed area (subject to being divested of those rights by order of the Commission under certain circumstances not present here) and thereby removed the subject matter from the jurisdiction of the municipality before the municipality had authority to deal with it.

To repeat brief excerpts from the opinion of the Mississippi Court in the *Delta* case (149 So.2d at page 513), which passages were adopted on this point in the opinion in the case at bar (150 So.2d at page 542):

> "A municipality in Mississippi is a creature of the state. It has only such power and authority as may be granted to it by statute. . . .
>
> "Municipal ordinances are necessarily local in their application. They apply only to the territory of the municipality by which they were enacted. . . .
>
> ". . . When they (the franchise and street lighting contract) were executed by the city, no statute of this state authorized Winona to grant a franchise

or street lighting contract to the disputed area, then outside the city. Winona's power was confined to its corporate limits. The city had no extraterritorial power of any kind to grant company any rights in the disputed area when the contracts were executed.

". . . The municipal franchise and street lighting contract were not pre-existing rights as to the area involved in this suit, because before they could attach, if at all, the certificate issued to Delta by the Commission under the Act attached to the disputed area."

This Court will not gainsay the Mississippi Court as to the meaning of state statutes delineating the authority granted by the state to its municipalities. It will accept those statutes as meaning precisely what the state court of last resort has construed them to mean. *A fortiori*, where the state court of last resort has determined that there is no state statute granting extraterritorial power to municipalities—and Appellant cites none—this Court will accept that determination.

In 3 *Cyclopedia of Federal Procedure*, 3rd Ed., Section 6.14, pages 183-186, it is said:

"State decisions establishing state law constitute the rule of decision where they are applicable to matters in civil actions in the federal courts and where the Federal Constitution, federal statutes, treaties or state statutes are not applicable thereto, Swift v. Tyson in this respect being overruled by the Erie case. Of course, the highest state authority is the final authority on state law . . .

"State decisions construing state statutes and municipal ordinances are to be followed as the rule of decision in federal courts. The same rule applies to the construction of state constitutions, and it also applies to the interpretation of state administrative orders under authority of state statutes."

In *Albertson* v. *Millard*, 345 U.S. 242, 73 S. Ct. 600, 97 L. ed. 983 (1953), there was an appeal by plaintiffs from a judgment of the United States District Court for the Eastern District of Michigan holding that the Michigan Communist Control Bill was constitutional. This court held:

> "The construction given to a state statute by the state courts is binding upon the federal courts. There has been no interpretation of this statute by the state courts. The absence of such construction stems from the fact this action in federal court was commenced only five days after the statute became law.
>
> "There is pending in the Circuit Court for Wayne County, Michigan, a bill seeking a declaratory judgment that the Act is unconstitutional, both on federal and state grounds. That action is being held in abeyance pending our mandate and decision in this case.
>
> "We deem it appropriate in this case that the state courts construe this statute before the District Court further considers the action. (Citing cases)
>
> "The judgment is vacated and the cause remanded to the District Court. . . ."

In *United States* v. *Burnison*, 339 U.S. 87, 70 S. Ct. 503, 94 L. ed. 675 (1950), two appeals were combined for decision and they involved the power of the California Supreme Court to declare invalid testamentary dispositions to the United States by two California residents. This court said:

> "The California Court construed Section 27 of the California Probate Code to prevent a California domiciliary from making an unrestricted testamentary gift to the United States, although such a gift may be made to California, its counties and municipal corporations. The court arrived at this interpretation despite the contention of the United States that it

would raise serious constitutional questions. The construction of the California Code by the California Supreme Court is, of course, binding on us. It leaves us, however, with the federal constitutional questions that the United States urged the California Court to avoid."

It is, therefore, submitted that Appellant had no franchise or street lighting agreement affecting the disputed area as of the date the Act was adopted, March 29, 1956, and it follows that there could have been no impairment.

C. Even If Appellant's Franchise and Street Lighting Agreement Had Been Effective As to the Disputed Area on the Effective Date of the Act, the Act Would Still Be Valid

It is clear that the franchise and street lighting contract were absolute nullities as to the disputed area as of the date the Act granted the exclusive service rights of the area to Appellee, March 29, 1956, but even if they had been effective as to the disputed area on that date the Act would have been a valid exercise of the police power of the state.

Not every impairment of the obligations of contracts is proscribed by the contract clause of the Federal Constitution. If the impairment results from a legislative enactment adopted in the reasonable exercise of the police power of the state for the protection and welfare of all of its citizens, the enactment is valid notwithstanding the impairment.

Both the preamble and the text of the Act reveal legislative determination that it was urgent that a statewide system of regulation of certain public utilities be

established, including among other things rates, services and *service area allocations*, in order to protect and promote the public interest and welfare. The preamble read as follows:

> "WHEREAS, the services of certain public utilities have been extended to large areas of the state, both within and outside of municipalities, and it is in the public interest that the Public Service Commission of the State of Mississippi be vested with authority to regulate such utilities' rates and services, so as to assure reasonably adequate services to the inhabitants of this state at rates which will be fair and reasonable to the consumer, and provide a fair return to said utilities, both of which objectives are necessary to the general welfare of this state; Now, Therefore, . . ."

The text of the Act included provisions for allocation and certification of service areas to all utilities,—Appellant, Appellee and all others. Such allocations were to be made primarily under the "grandfather clause" on the basis of prior service so that each utility would be assured of all the territory it was then serving as a matter of right; and such additional territory as it could, upon petition and proof, show that the public convenience and necessity required or would require should be certificated to it.

The service area so certificated to the respective utilities were exclusive except where under certain circumstances the Commission should order partial cancellation of their certificates (basically this could be done only in an instance where a utility failed or refused to provide adequate service to a portion of its certificated area). This exclusivity was deemed to be, and obviously was, in the public interest for many reasons, including economy, avoiding the duplication of service facilities, avoiding un-

wholesome or "cutthroat" competition, avoiding what is known in the industry as "pirating" customers, and the like. (Chapter 372, *Mississippi Laws of 1956*, Section 5; Section 7716-05, Vol. 6 Recompiled, *Mississippi Code of 1942*).

In such circumstances the state, in the exercise of its police power, would have been permitted to adopt the Act for alleviation of the problems involved, even if contractual rights had been thereby impaired. Otherwise, municipalities, corporations and individuals could, by their contracts, hinder and impede the sovereignty in the exercise of its police power in the interest of the health, safety, morals, comfort and general welfare of the state as a whole. This principle is universally recognized and sustained by the authorities. In 16 *C.J.S.*, Constitutional Law, Section 281, the principle is expounded as follows:

> "In accordance with the rule that the state may not divest itself by contract or otherwise of its police power, one state legislature cannot by any agreement bind itself or its successors not to exercise the police power of the state. The reservation of essential attributes of sovereign power is read into contracts as a postulate of the legal order. All contracts are made with reference to the possible exercise of the police power of the government and with the possibility of such legislation as an implied term of the law thereof; and whether made by the state itself, by municipal corporations, or by individuals or private corporations, they cannot extend to defeat legitimate government authority, but are subject to be interfered with, or otherwise affected by, subsequent statutes enacted in a bona fide and appropriate exercise of the police power, and do not, by reason of the contracts clause of the constitution, enjoy any immunity from such legislation, regardless of whether the legislative action affects contracts incidentally, or directly or indirectly.

"This rule is not only reasonable, but necessary, since a rule to the contrary would enable individuals, by their contracts, to deprive the state of its sovereign power to enact laws for the public welfare. . . .

"The foregoing rules have been applied to regulations of public service agencies, of business, of the professions, of the use of public highways, . . ."

The same principle is effectively expounded by the Mississippi Court in the *Delta* case, *supra* (149 So.2d at page 508) as follows:

"United Gas Corp. v. City of Philadelphia, 238 Miss. 409, 118 So.2d 618 (1960), is significant. Miss. Code 1942, Sec. 3433, authorized a city to fix utility rates subject to review by the chancery court. Thereafter the Public Utility Act repealed Section 3433, and vested in the Commission the right to determine such rates. In 1946, the city granted United a franchise for 25 years. United proposed to increase its gas rates, and the city obtained an injunction prohibiting it from doing so. Reversing that decree, this Court held that jurisdiction to fix rates was vested by the 1956 Act in the Commission. The city's remedy was said to be before the Commission, and no longer the chancery court. The legislature 'reserved the right to pass such laws as may be expedient or necessary in municipal affairs.' *The 1956 Act superseded pro tanto the precedent franchise to United.* The legislature, acting under its police power, had the right to vest in the Commission power, to determine rates." (Emphasis added).

In the case at bar, even if the disputed area had been within the jurisdiction of the City of Clinton in 1946 when the franchise and street lighting agreement were given, such technical "impairment" as might have been involved in its being allocated to Appellee as service area would certainly have been permissible, particularly since Appellee had provided all the electric service in the area

beginning in 1944 and continuing to March 29, 1956, the effective date of the Act; had made large investments therein for the purpose; had held itself out to the public as offering its services therein to all who applied therefor; had actually served all who had applied for service; and its services had been entirely adequate and satisfactory. (Appellee's facilities in the disputed area were reasonably worth $5,801.00, not including "back-up" facilities [R 786 and Exh. 10]; Appellee's facilities in the disputed area were in excellent condition and its service therein was and had always been excellent [R 755, 769, 1231 and Exh. 63]; and as of the date of hearing Appellee had fourteen services in the area, including residential, church and commercial [R 1231 and Exh. 63]). On the other hand, Appellant never at any time offered its services, built any facilities or rendered any service in the disputed area prior to the effective date of the Act.

Therefore, as of March 29, 1956, it is manifest that the state in the exercise of its police power in setting up a statewide system of allocation of service areas, the regulation of rates, services, etc., was empowered in any event to determine that the disputed area should continue to be served by Appellee in the public interest. Any other determination would have meant that the area would have been burdened with two sets of electric utility facilities and field operating expenses of two utilities rather than one, all of which would have to be paid for by the consumers and would be wasteful as well as unsightly and a hinderance to the full use and enjoyment of the land.

D. There Was No Violation of the Fourteenth Amendment to the Constitution of the United States

All that is said under Points A, B and C above is equally applicable in respect of alleged violations of the

due process and equal protection clauses of the Fourteenth Amendment. To avoid repetition it is adopted by reference.

On the effective date of the Act, March 29, 1956, Appellant held no rights by contract or otherwise to provide service to the disputed area. Therefore, the Act by allocating said area to Appellee did not thereby deprive Appellant of any property or right whatsoever; nor did it deny to Appellant the equal protection of the laws.

E. Exclusivity of Service Rights in Disputed Area

Appellant makes a point on exclusivity which is difficult of understanding. Apparently, Appellant questions the right of the State to allocate service areas on an exclusive basis (to the extent that they are exclusive under the Act) and gives as the bases for this point the contract clause and the due process clause of the Federal Constitution.

But in the final analysis, Appellant's implied claim of a right to "share" in the service of the area is predicated on its claim of a franchise from the municipality of Clinton and it has been shown that the franchise literally did not exist in respect of the disputed area on the effective date of the Act. There was, therefore, no reason why this part of Appellee's certificated area should not be certificated under the same measure of exclusivity as all other parts of its certificated service area (being the same limited exclusivity accorded to all utilities throughout the State in respect of their several certificated areas). The feature of exclusivity was provided in the interest of the public, not the utilities.

Actually, Appellant by its pleadings and briefs sought to obtain for itself the exclusive right to serve the dis-

puted area. By its cross-petition it sought to have Appellee take up and remove its service facilities (in place since 1939) and quit the area.

On this point it is enough to say that the State is sovereign; the legislature within the framework of the Constitution may act for the whole people by the passage of laws; nothing in the Constitution limits the right of the legislature to set up by law a statewide system of regulating public utilities, which includes allocation of service areas with limited exclusivity such as that provided for in the Act; and that was done by the legislature in the passage of the Act effective March 29, 1956.

It is inconceivable that a public utility (Appellant) while claiming exclusivity within its own certificated area may complain that its constitutional rights have been impaired because neighboring utilities enjoy a like exclusivity in their respective certificated areas.

The legislature has determined that the limited exclusivity, accorded to all utilities alike, and to be respected by all, is in the public interest. In the absence of constitutional limitation, there can be no question as to the validity of such provision. The legislature was manifestly correct in making the determination (some of the reasons being given above), but there is no occasion for justification here. That is a question for determination by the legislative, not the judicial, branch of government.

F. Authority of Administrator of Rural Electrification Administration to Make Loans

In the Jurisdictional Statement, pages 32 to 39, inclusive, Appellant discusses the authority of the Administrator of the Rural Electrification Administration to make

loans, particularly for the construction of generation and transmission facilities. It is submitted that this discussion does not present a question that is involved in this case, nor is it material to any question in this case.

As best we glean the purpose of the discussion, it is to the effect that in Appellant's view the Rural Electrification Administration should not have (many years ago) made a loan to Appellee, since in the absence of such financing perhaps Appellee would not be thriving in business today and the good parts of its certificated service area, those desired by Appellant, might be available for certification to Appellant.

Certainly Appellee has never borrowed any money from the Rural Electrification Administration to build facilities in a municipality having a population of 1500 or above, nor has it borrowed money to construct facilities for the service of persons who were receiving central station service. (These are two of the limitations upon the Administrator's authority to which Appellant referred). But if it had done so the Administrator is not on trial in this case for exceeding his authority. Indeed, if he had exceeded his authority in this or any other instance only the United States through its proper officers and in a proper proceeding for the purpose could raise the question.

Certainly Appellee does not derive its authority or obligations to the public as a corporation and a public utility from any Act of the Congress. (Appellant asserts (Jurisdictional Statement, p. 37) that the Mississippi Court has "expressly rewritten the federal statute so as to authorize Appellee to pre-empt an area as a public utility.") It is chartered under the laws of Mississippi, its authority, duties and responsibilities as a public utility are granted and imposed by the laws of Mississippi; and

it is operating under those laws. It was organized and is operating under Charter 184, *Mississippi Laws of 1936*, as amended (Section 5463 *et seq.*, Vol. 4A Recompiled, *Mississippi Code of 1942*) and its authority, duties and responsibilities as a public utility are granted by and imposed under the terms and provisions of Chapter 372, *Mississippi Laws of 1956* (Section 7716-01 *et seq.*, Vol. 6 Recompiled, *Mississippi Code of 1942*).

It is submitted that the discussion on this point contained in the Jurisdictional Statement (which was presumably intended to be on Question V set out on page 7 of the Jurisdictional Statement) has no bearing whatever on any question that was involved in the trial or decision of the cause in the state court; and it has no relevancy here.

G. Appellant's Authorities and Argument

It will be seen from the foregoing that Appellant's authorities and argument are beside the point and actually require no further answer or discussion.

Appellant's theory of the case necessarily assumes that it had a franchise and street lighting contract from the City of Clinton covering the disputed area as of the effective date of the Act, March 29, 1956,—pursuant to the terms of which the service rights were granted by the State to Appellee. But such was not the case. The earliest time that those contracts could have become effective as to the disputed area under any circumstances was the date said area was annexed to the municipality, March 25, 1960; and since at that date the State in the exercise of its police power had already granted the service rights to said area to the Appellee, the contracts never became effective as to said area.

Appellant relies upon statutes authorizing municipalities to make contracts and grant easements or franchises for the use of streets and public places in the erection of utility facilities (Sections 3375, 3406 and 3376, *Mississippi Code of 1942*, and Sections 3374-02, 3374-10 and 3374-120, Vol. 3 Recompiled, *Mississippi Code of 1942*) as authority for its assumption that its franchise and street lighting contract covered or affected the disputed area prior to its annexation to the municipality and that the State was therefore precluded from granting the service rights thereto by legislative enactment and certificate to Appellee. But as shown above, the Mississippi Court has expressly and repeatedly held that said statutes do not grant power to municipalities in respect of territory not within their corporate boundaries. Indeed, the Court said in *Delta Electric Power Association* v. *Mississippi Power & Light Company et al., supra,* "When they (the franchise and street lighting contract) were executed by the city, *no statute in this state* authorized Winona to grant a franchise or street lighting contract to the disputed area, then outside the city." (Emphasis added) Of course, the same was true of the City of Clinton.

Moreover, as shown above, even if the contracts had been effective as to the disputed area on the effective date of the Act, still the Act would have been a valid exercise of the police power of the State.

It is manifest, therefore, that Appellant's authorities and argument are wholly beside the point and require no further answer or discussion.

CONCLUSION

It is, therefore, respectfully submitted that this appeal not only fails to present any substantial federal question, but fails to present any federal question at all.

The Jurisdictional Statement shows upon its face that no federal question is presented in that it shows (Appendices 1 and 2) that under decisions of the Mississippi Court: (1) The City of Clinton had no power or authority except such as was granted to it by state statutes; (2) the statutes relied upon to empower the city to grant rights in the disputed area before its annexation to the municipality did not have that effect; and (3) no other statute of the state had that effect.

Appellee, therefore, respectfully submits that this motion to dismiss the appeal should be sustained.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, T. Harvey Hedgepeth, one of the attorneys of record for Capital Electric Power Association, Appellee in the above styled cause, and a member of the bar of the Supreme Court of the United States, hereby certify that I have this day served the foregoing motion to dismiss upon Appellants and other interested persons in the following manner: By depositing copies thereof in sealed envelopes in the United States Post Office at Jackson, Mississippi, with first class postage prepaid, properly addressed, to each of the attorneys of record for Appellant, Mississippi Power & Light Company, to-wit: Sherwood W. Wise, Electric Building, Jackson, Mississippi; Fred B. Smith, Ripley, Mississippi; Garner W. Green, Electric Building, Jackson, Mississippi; and Joshua Green, Electric Building, Jackson, Mississippi; and to Charles C. Jacobs, Jr., Commerce Building, Cleveland, Mississippi, attorney of record for Mississippi Municipal Association; and to E. W. Stennett, Barnett Building, Jackson, Mississippi, attorney of record for City of Clinton, Mississippi; and to Hardy Lott, 226 Aven Building, Greenwood, Mississippi, attorney of record for Delta Electric Power Association; and to the following who were *Amici Curiae* in the Supreme Court of Mississippi: Everette Truly, City Bank Building, Natchez, Mississippi, attorney for Southwest Mississippi Electric Power Association; Henry Ware Hobbs, Jr., Panzica Building, Brookhaven, Mississippi, attorney for Magnolia Electric Power Association; O. F. and J. O. Moss, Lucedale, Mississippi, attorneys for Singing River Electric Power Association; D. H. Waits, North Broad Street, Leland, Mississippi, attorney for Twin County Electric Power Association; John K. Keyes, Collins, Mississippi, attorney for Southern Pine Electric

Power Association; David C. Welch, The Gardiner Center Offices, Laurel, Mississippi, attorney for Dixie Electric Power Association; J. P. Stone, Coffeeville, Mississippi, attorney for Tallahatchie Valley Electric Power Association; Leon L. Porter, Jr., Stevens Building, Clarksdale, Mississippi, attorney for Coahoma Electric Power Association; Michael D. Haas, 128 Court Street, Bay St. Louis, Mississippi, attorney for Coast Electric Power Association; Ernest R. Duff, Newsom Building, Columbia, Mississippi, attorney for Pearl River Valley Electric Power Association; Griffin Norquist, Williams Building, Yazoo City, Mississippi, attorney for Yazoo Valley Electric Power Association; Thomas H. Watkins, Plaza Building, Jackson, Mississippi, attorney for Mississippi Power Company; and James S. Eaton, 2300 14th Street, Gulfport, Mississippi, attorney for Mississippi Power Company.

This September ....., 1963

.....

T. HARVEY HEDGEPETH

APPENDIX 1

IN THE SUPREME COURT OF MISSISSIPPI

No. 42,480

CAPITAL ELECTRIC POWER ASSOCIATION

v.

MISSISSIPPI POWER & LIGHT COMPANY, ET AL.

KYLE, JUSTICE:

This case is before us on appeal by Capital Electric Power Association from a decree of the Chancery Court of the First Judicial District of Hinds County, reversing a cease and desist order issued by the Mississippi Public Service Commission on July 6, 1961, upon the petition of Capital Electric, ordering that Mississippi Power & Light Company cease and desist from rendering electric service or street lighting service in an area recently annexed to the City of Clinton, which had been certificated to Capital Electric by the Public Service Commission.

The record shows that Capital Electric Power Association is a Mississippi Corporation organized and existing under authority of the Electric Power Association Act of 1936, Miss. Laws 1936, Ch. 184; Miss. Laws 1938, Chs. 251-252; Miss. Code 1942, Rec., Secs. 5463-5489. It is a public utility engaged in the transmission and distribution of electricity for lighting, heating and power purposes, and is vested with authority to operate electric services both in and without municipalities. Code Sec. 5478(8). It has the power of eminent domain. Sec. 5474 (16) (14). Capital Electric operates in parts of seven counties in the central part of the state, including the area lying east of

the City of Clinton in Hinds County, and is obligated to render nondiscriminatory service to all persons living in its service areas who apply for such service.

The area involved in this controversy is an area approximately 1/4 mile wide, east and west, and 1/2 mile long, north and south, lying immediately east of the corporate limits of the City as the same existed prior to March 25, 1960. The area is bounded on the north by the right of way line of Clinton Boulevard, on the west side by the city limits as they existed prior to March 25, 1960, and on the south by old U.S. Highway No. 80, and on the east by the north-south half section line running through Section 28, Township 6 North, Range 1 West. The area is referred to in the record and in the briefs filed on this appeal as the "disputed area"; and will be referred to by us in the same manner.

The record shows that Capital Electric began to furnish electric service to persons desiring such service in the disputed area in 1944, and has continued to serve all persons applying for such service since that time. Lines have been added as needed. Such service was being furnished to 14 subscribers, including residential, church and commercial, at time of the hearing of this cause. Neither Mississippi Power & Light Company nor any other electric utility had ever furnished electric service to subscribers in the area prior to the annexation of the area by the City of Clinton on March 25, 1960, except residents of two dwelling houses located on the extreme northern edge for which electric service had been provided by the Company for two of its employees prior to the enactment of Ch. 372, Laws of 1956, and which were "frozen" by agreement of the parties and an order of the Public Service Commission dated September 21, 1959.

The record shows that, after the enactment of the Public Utility Act, Ch. 372, Laws of 1956, which became effective March 29, 1956, Capital Electric filed with the Public Service Commission under authority of paragraph (b) of Section 5 of the Act, commonly called the "grandfather" clause, its application for a certificate of public convenience and necessity authorizing it to continue its operations as a public utility serving the designated areas which were being served by it on the effective date of the Act. The application was entered upon the docket of the Commission as Docket No. U-84. Mississippi Power & Light Company was made a party to the proceeding. After extended negotiations between Capital Electric and the Company for the settlement of area claims, the Commission, by an order entered in Docket No. U-84 on September 21, 1959, granted to Capital Electric a certificate of public convenience and necessity, covering the areas which were being served by it on the effective date of the Act, including the area involved in this controversy. The area certificated to Capital Electric as its service area was described in the order of the Commission by metes and bounds and included the area involved in this controversy. No petition for a rehearing was filed, and no appeal was taken from the final order of the Commission in that matter; and thereafter Capital Electric continued to furnish electric service to its subscribers in the area. The record shows that Capital Electric does not have and has never had a municipal franchise in the City of Clinton. It does not have and has never had a street lighting agreement with the City of Clinton. However, the record shows that a written offer was made by Capital Electric to the City on August 23, 1960, to furnish street lighting service to the City in the disputed area on the same terms as such service was being rendered by Mississippi Power & Light Company.

The record shows that the appellee, Mississippi Power & Light Company, hereinafter referred to as the Company, is an investor-owned public utility incorporated under the laws of the State of Florida and qualified to do business in the State of Mississippi. All of its property is located in the western half of the state. Its general offices are located in the City of Jackson. The Company has operated in Mississippi since 1924. Its current franchise, authorizing the use of the streets, highways and public places in the City of Clinton, was granted by the City on December 6, 1946, for a period of 25 years. On December 16, 1946, the governing authorities of the municipality approved an exclusive street lighting contract with the Company, which provided that, "Company will furnish and municipality will take and pay for its entire street lighting service during the term of this agreement." The contract had been in effect continuously from December 16, 1946, to the date of the hearing.

On November 25, 1959, the Public Service Commission, in Docket No. U-44, granted to the Company a "grandfather" certificate of public convenience and necessity, pursuant to the provisions of paragraph (b) of Section 5, of the Public Utility Act, covering numerous areas in various parts of the state, including the area lying within the corporate limits of the City of Clinton, but not including the area involved in this controversy which at that time was not a part of the City. As in the case of Capital Electric, the Company's "grandfather" certificate described the service areas of the utility by metes and bounds.

The events leading up to the filing by Capital Electric of its petition against the Company in this cause asking for a cease and desist order were substantially as follows: The decree of the Chancery Court of the First Judicial

District of Hinds County, approving the extension of the city limits of the City of Clinton so as to include within the City the area involved in this controversy, along with certain other small areas lying outside of the City, became final on March 25, 1960. On May 3, 1960, the mayor and board of aldermen of the City adopted a resolution authorizing the mayor and clerk to execute in behalf of the City a supplemental agreement with the Company for the furnishing of street lighting in the newly annexed territory. The city clerk thereupon addressed a letter to the Company's manager designating certain locations for new street lights to be installed by the Company on Morrison Drive, and on May 16, 1960, the Company's workmen entered the disputed area and erected a distribution line covering a distance of 1775 feet. The line entered the disputed area on the north at the intersection of the south right of way line of Clinton Boulevard and Morrison Drive and ran in a southerly direction along Morrison Drive to the north right of way line of U.S. Highway 80. The line was built immediately across the street from Capital Electric's line and duplicated Capital Electric's line. The Company also installed five street lights, four of which were located directly across the street from street lights already provided by Capital Electric, which were then in operation. The Company also installed a permanent service line into the newly constructed residence of C. M. Kelley, where Capital Electric Service was already being used for construction purposes.

On May 25, 1960, Capital Electric filed its petition in this cause with the Public Service Commission and asked that, upon the hearing of the petition, the Commission enter an order directing the Company to remove the line so constructed by it in the disputed area, and directing that the Company cease and desist offering its service to

service locations or constructing service facilities within the disputed area. Capital Electric also asked for general relief.

The Company filed its answer to the petition on July 22, 1960. In its answer the Company admitted that on May 16, 1960, it had built the line in question within the disputed area, and that it had served the owner of one residence from that line and had also installed along Morrison Drive five street lights. As matters of affirmative defense, the Company alleged that it was operating under a franchise from the City of Clinton dated December 16, 1946, which was a 25-year franchise and that the rights and obligations conferred by the City upon the Company by that franchise were protected by Ch. 372, Laws of 1956, and particularly by paragraph (g) of Section 5 thereof. The Company further alleged that it was the only supplier of electric energy operating in the City or any part thereof to which a franchise had been granted by the City, and that it was paying the City two per cent of its domestic and commercial receipts derived from its operations within the City. It alleged that Capital Electric had applied to the City for a franchise, and that the mayor and board of aldermen had refused to grant the same.

The Company further alleged that it had received on November 25, 1959, in Cause No. U-44, a "grandfather" certificate to serve the City of Clinton, pursuant to Section 5(b) of the Public Utility Act; that it had an exclusive street lighting contract with the City under which it was presently operating; that its right to furnish electric service in the area which had been incorporated into the city was protected by the due process clause and equal protection clause of the Constitution of the United States and the due process clause of the Mississippi Constitution. The Company alleged that it had offered to purchase from

Capital Electric, or to trade with Capital Electric for other facilities located elsewhere, all facilities which Capital Electric had in the City of Clinton. The Company incorporated in its answer a cross petition in which it asked that Capital Electric be ordered to cease and desist from maintaining its electric distribution service in the disputed area, and to remove its equipment and distribution facilities from the area.

The Mississippi Municipal Association filed a petition asking that it be permitted to intervene on behalf of the municipalities of the state as parties interested in the litigation. The City of Clinton also filed a petition asking that it be permitted to intervene as an interested party. Both petitions were granted by orders of the Commission dated September 16, 1960. The Municipal Association then filed its answer to the petition of Capital Electric; and the City of Clinton filed an answer and cross-petition in which it averred that Capital Electric had no right to continue to operate its facilities in the disputed area after March 25, 1960, for the reason that it had never been granted a franchise to operate within the City.

Extended hearings were held by the Public Service Commission on the issues presented by the pleadings. The hearings were concluded on February 27, 1961. The Commission took the case under advisement, and on July 6, 1961, the Commission rendered its decision in favor of Capital Electric and entered a cease and desist order as prayed for in Capital Electric's petition. The relief prayed for in the cross petitions filed by Mississippi Power & Light Company and the City of Clinton was denied, and the cross petitions were dismissed.

The Commission in its order found that Capital Electric had been granted a certificate of convenience and necessity by the Commission in Docket No. U-84 on Sep-

tember 21, 1959, which authorized it to continue to operate its electric facilities and serve the needs of electric consumers in the area that it was serving on March 29, 1956, the effective date of the Public Utility Act; that the certificate of convenience and necessity contained a particular description of the area involved in this litigation; and that continuously, since March 29, 1956, Capital Electric had been rendering reasonably adequate electric service within the area. The Commission found that the new facilities constructed by Mississippi Power & Light Company in the disputed area were within the areas specifically certificated to Capital Electric by the Commission in Docket No. U-84; and that the Company, unless ordered to cease and desist therefrom, would offer and render electric service to consumers of electric power within the disputed area, and would continue to render street lighting service within the area; that the real issue in the controversy was whether or not the holder of a certificate of convenience and necessity issued by the Commission was entitled to be protected against an invasion of its certificated area by the construction and operation of electric facilities therein by another electric utility which did not have a certificate authorizing it to serve the area. The Commission was of the opinion that the municipal franchise granted to the Company by the City of Clinton was not germane to any of the issues in the cause and had no bearing on the case. The Commission did not pass upon the validity of the franchise or attempt to construe its provisions.

The Commission, by an order duly entered upon its minutes, ordered that the respondent, Mississippi Power & Light Company, cease and desist from rendering any electric distribution service or street lighting service in the disputed area, and that the Company remove "all of its electric lines and facilities, which it has constructed

and is now operating and maintaining within the disputed area," within a period of 30 days from the date of the order. In its order the Commission stated that its decision was based solely upon the rights arising out of the certificates of convenience and necessity granted the two utilities in Docket Nos. U-44 and U-84; that the first certificate did not include the disputed area; that the second certificate did include the area in question. From that order the respondent, Mississippi Power & Light Company, prosecuted an appeal to the Chancery Court of the First Judicial District of Hinds County. The City of Clinton and the Mississippi Municipal Association likewise prosecuted appeals.

The cause was heard by the chancery court as an intermediate court of appeals upon the voluminous record made during the hearing before the Commission, and on April 20, 1962, that court entered a judgment reversing the order of the Public Service Commission and ordering that the petition of Capital Electric for a cease and desist order be dismissed. The court was of the opinion that the order of the Commission violated the statutory rights of Mississippi Power & Light Company and the City of Clinton: that, when the City of Clinton extended its corporate limits and annexed adjoining areas which included the disputed area in this cause the certificate of convenience and necessity granted to Capital Electric under the Public Utility Act of 1956, in so far as it covered the disputed area, became ineffective and Capital Electric could not operate within the corporate limits of the City inasmuch as it had not been granted a franchise by the City. The cause is now before us on appeal by Capital Electric from the judgment entered by the chancery court reversing the order of the Commission.

The attorneys for Capital Electric have assigned and argued four main points as ground for reversal of the judgment of the lower court:

(1) That the court erred in holding that when the City of Clinton expanded its corporate limits on March 25, 1960, and annexed the disputed area, the certificate of public convenience and necessity theretofore issued by the Public Service Commission to Capital Electric, under and pursuant to Section 5(b) of the Public Utility Act of 1956, became ineffective in so far as it covered the disputed area; (2) that the court erred in holding that the expansion of the corporate limits of the City of Clinton on March 25, 1960, destroyed the vested service rights acquired by Capital Electric by virtue of its having served the disputed area for many years prior to that date, which rights had been recognized and expressly reserved and granted to Capital Electric by the terms of the Public Utility Act itself; (3) that the court erred in holding that Capital Electric was barred of its right to operate within the disputed area after the annexation by the City for the reason that Capital Electric had not been granted a municipal franchise by the City; (4) that the court erred in its holding that the cease and desist order of the Commission issued on July 6, 1961, was erroneous in law and violative of the statutory rights of Mississippi Power & Light Company and the City of Clinton.

It is argued on behalf of the appellees in support of the judgment of the lower court that the statutes of Mississippi in unmistakable terms, have given to municipalities complete jurisdiction of streets and the absolute right to regulate by franchise the use which can be made of the streets by public utilities; that the power to determine what utilities may operate within and use the streets and public ways of a municipality is definitely vested in the

municipality by Sections 3374-119 and 3371-120, and Section 3374-73, Miss. Code of 1942, Rec.; and that only those acquiring and holding a franchise from the municipality itself can operate a utility therein. It is also argued on behalf of the appellees that it clearly appears from the language used in paragraph (g) of Section 5 of the Public Utility Act that it was the legislative intent that a utility should not be permitted to operate within a municipality wihout first obtaining a franchise from the municipality; that Capital Electric had not been granted a franchise by the City of Clinton, and for that reason the chancery court was eminently correct in its holding that Capital Electric should no longer be permitted to operate in the disputed area since the area had been annexed to and made a part of the City.

The questions of law presented for our decision on this appeal are substantially the same as the questions presented in Delta Electric Power Association v. Mississippi Power & Light Co., et al., Cause No. 42,535, decided by this Court on February 11, 1963. There is no substantial dispute as to the facts in this case, and on the questions of law the opinion rendered in the Delta Electric Power Association Case is controlling here. We think there was error in the court's holding that the cease and desist order of the Commission violated the statutory rights of Mississippi Power & Light Company and the City of Clinton. We also think that there was error in its holding that the extension of the corporate limits of the City of Clinton so as to include the disputed area within the City rendered ineffective as to that area the certificate of convenience and necessity granted to Capital Electric under authority of paragraph (b) of Section 5 of the Public Utility Act, and in its holding that Capital Electric was barred of its right to operate within the disputed area after

its annexation to the City without first obtaining a franchise from the City.

As stated by the Court in the opinion rendered in the Delta Electric Power Association Case, prior decisions interpreting the Public Utility Act have established two propositions: (1) Awards by the Commission of "grandfather" certificates under Section 5 are made on an area rather than a facility basis; and (2) a certificate of convenience and necessity issued by the Commission is a valuable right which is entitled to protection by the courts. Capital Electric Power Association v. Mississippi Power & Light Co., 240 Miss. 139, 125 So.2d 739; Mississippi Power Co., et al v. East Mississippi Electric Power Association and Public Service Commission (Miss. 1962), 140 So.2d 286.

In Capital Electric Power Association v. Mississippi Power & Light Co., supra, which is generally referred to as the "Elton Case," the Court, in discussing the nature of the right acquired by Capital Electric by virtue of the certificate of convenience and necessity issued to it under paragraph (b) of Section 5 of the Public Utility Act, said: "Capital Electric Power Association is a corporation chartered and operated under Chapter 184, Laws of 1936, Section 5463 et seq., Code of 1942. It is obligated to render nondiscriminatory service to persons living in the area served by it and on the routes traversed by its distribution lines, if they subscribe therefor. Capital Electric Power Ass'n. v. McGuffee, 226 Miss. 227, 83 So.2d 837, 84 So.2d 793, 56 A.L.R. 2d 403. Having served the electrical requirements in the Elton area for more than 17 years, Capital Electric, under paragraph (b) of Section 5, Laws of 1956, Section 7716-05, Code of 1942, acquired the right to a certificate of convenience and necessity therein, being in truth and in fact a franchise from the State. Such right

is indeed a valuable one. 'A non-exclusive franchise is a valuable right which can be protected in the courts.'"

In the Delta Electric Power Association case, the court had under consideration the effect of the annexation by the City of Winona of an area lying west of the City, which constituted a part of the service area certificated to Delta Electric by the Public Service Commission and which the Company claimed under a municipal franchise granted by the City many years prior to the annexation; and in its opinion in that case the Court said: "Prior to the Public Utility Act of 1956, Delta for many years had been serving customers in the disputed area, when it was not within the municipal limits. Before the 1959 expansion of Winona's boundaries, Delta obtained its certificate from the Commission to serve that area. The Company's certificate did not include it. We do not think the Act is susceptible of a construction which would permit subsequent expansion of the city limits to extend the Company's service rights into the disputed territory. If it should, this would permit Company's franchise from the city, executed long before the annexation, when coupled with the expansion order, to supersede the prior grandfather certificate granted by the Commission to Delta for the disputed area. This is not consistent with the terms of the Act or with the legislative purposes."

What was said in the Delta Electric Power Association case is equally applicable to the facts in this case. The Public Utility Act, in our opinion, is not susceptible of the construction contended for by the appellees and adopted by the lower court, that, when the City of Clinton extended its corporate limits and annexed the disputed area the certificate of convenience and necessity granted to Capital Electric under paragraph (b) of Section 5 of the Act, in so far as it covered the disputed area, became in-

effective. If the legislature had intended that awards by the Commission of service areas under the "grandfather" clause of Section 5 of the Act should be only tentative and subject to change in the event a portion of the certificated area lying outside of a municipality on the effective date of the Act should be thereafter incorporated in a municipality, the legislature in our opinion would have expressly provided for such change and for payment of compensation to the utility whose rights were adversely affected.

As to the appellees' contention that paragraph (g) of Section 5 of the Public Utility Act indicates a legislative intent that a utility shall be required to obtain a franchise from the muncipality before operating therein, we think that contention has been fully answered in the opinion rendered in the Delta Electric Power Association case. There is nothing in paragraph (g) of Section 5 to indicate that a utility which has obtained and is operating under a certificate of convenience and necessity issued by the Commission shall have its certificate revoked in whole or in part, or shall be required to apply for another certificate of convenience and necessity, if a part of its certificated area is later incorporated into a municipality.

It is finally contended on behalf of the appellee, Mississippi Power & Light Company, that to deny extension of the Company's municipal franchise and street lighting contract to the disputed area in this case would violate the impairment of contracts and due process clauses of the state and Federal constitutions. Mississippi Constitution of 1890, Secs. 14, 16; U. S. Constitution, Art. I, Sec. 10, par. 1; 14th Amendment. But that contention has also been answered in the opinion rendered in the Delta Electric Power Association case.

For the reasons stated above the judgment of the lower court, which reversed and set aside the order of the Public Service Commission, is reversed; and the order of the Public Service Commission is reinstated and affirmed.

REVERSED AND ORDER OF PUBLIC SERVICE COMMISSION REINSTATED AND AFFIRMED.

ALL JUSTICES CONCUR.

APPENDIX 2

IN THE SUPREME COURT OF MISSISSIPPI

No. 42,535

DELTA ELECTRIC POWER ASSOCIATION

v.

MISSISSIPPI POWER & LIGHT COMPANY, ET AL.

ETHRIDGE, JUSTICE:

This case involves an order of the Mississippi Public Service Commission (called Commission), directing Mississippi Power & Light Company (called Company) to cease and desist from rendering electric distribution service or street lighting service in a newly annexed area of the City of Winona, which was certified by the Commission to Delta Electric Power Association (called Delta). The Mississippi Municipal Association was allowed to intervene. It supported the position of the Company.

The Company and Municipal Association appealed from the Commission's order to the Chancery Court, First Judicial District of Hinds County, which reversed it. That court held that Delta had no right to operate in the disputed area, and ordered Delta to cease and desist from doing so. It

adjudicated that the Company's municipal franchise, upon expansion of the city limits, extended into the newly incorporated area, and thereby superseded Delta's certificate from the Commission, issued when the disputed area was outside the city limits.

The facts are without any substantial dispute. The issues are principally those of construction of Section 5 of the Public Utility Act of 1956, in the light of the facts and several prior decisions. Miss. Laws 1956, Ch. 372; Miss. Code 1942, Rec. Secs. 7716-01 to 7716-38. We conclude the Commission's order was correct, reverse the decree of the Chancery Court, and reinstate and affirm the Commission's issuance of a cease and desist order.

The precise issue is whether, under the Act, the expansion of the city limits extended Company's service area into the annexed area, under its municipal franchise granted prior to the 1956 Act and before the expansion, and superseded the prior grandfather certificate to the annexed tract, granted by the Commission to Delta, which served the area before it came within the city limits. We think it did not, and that Delta's certificate was properly protected by the Commission's order.

Both Delta and Company are public utilities engaged in the transmission and distribution of electricity, and subject to the Public Utility Act of 1956. Miss. Laws 1956, Ch. 372, Sec. ID. Delta is a Mississippi corporation organized and operating under the Electric Power Association Act of 1936. Miss. Laws 1936, Ch. 184; Miss. Laws 1938, Chs. 251-252; Miss. Code 1942, Rec., Secs. 5463-5489. It is vested with authority to operate electric services both within and without municipalities. Code Sec. 5474 (8). It has the power of eminent domain. Sec. 5474 (6) (14). Delta has the obligation and duty to render non-discriminatory service

to all persons subscribing for it, who live in the areas served by that corporation. Capital Elec. Power Assn. v. McGuffee, 226 Miss. 227, 83 So.2d 837 (1955). It operates in thirteen counties in the state.

Mississippi Power & Light Company, a subsidiary of Middle South Utilities, is incorporated under the laws of Florida, and qualified to do business in Mississippi. All of its property is located in this state, generally in the western one-half from the Tennessee to the Louisiana line.

Delta was incorporated in 1938. In 1940 it constructed an electric line in the vicinity of, but outside the west corporate limits, of the City of Winona. There were no other electric lines in this area, and electric services was not then available to anyone in this rural area. Delta served the only two customers in it who desired electricity at that time. After it was made available, and as a result of this and other factors, this area west of the city limits slowly developed, over a period of years, and Delta obtained other customers. It served all of these additional customers.

On February 23, 1948, the City of Winona granted a franchise to Mississippi Power & Light Company for electric service in that municipality, its streets and public places, "as they now exist or may hereafter be laid out or extended." This franchise was for a period of twenty-five years, so it expires in 1973. Since 1948 Company has been furnishing electric service in Winona under that franchise. During this same period and since 1940, Delta has been furnishing electric service to those desiring it in the disputed area which was west of the city limits prior to December 31, 1959.

In 1948 the City made a street lighting agreement with the Company, for five years, and renewable for similar addi-

tional periods unless either party elected to terminate it. That contract is still in effect.

The Public Utility Act became effective on March 29, 1956. Miss. Laws 1956, Ch. 372, Sec. 40. Before that date there was no statewide regulation by the Public Service Commission or any other state agency of the service areas, rates, or related operations of electric public utilities. Subject to certain limitations, the act vested "exclusive original jurisdiction" over these matters in the Commission. *Ibid.*, Sec. 4.

Section 5(b) provides for grandfather or prior service certificates of convenience and necessity. It states that the Commission shall issue such a certificate to any person engaged in the operation of electric facilities and equipment "for the construction or operation then being conducted, without requiring proof that public convenience and necessity will be served by such construction or operation," if the application was made within six months after the effective date of the act. Both Delta and the Company filed applications within the six months, and thereafter negotiated over a lengthy period for the purpose of agreeing on areas which they should recommend to the Commission for certification to Delta and Company, respectively. They agreed that the disputed area involved in this suit should be certificated to Delta and that certain other areas should be certificated to Company. Hence they submitted to the Commission a letter of agreement, and map showing the recommended areas of agreement for prior service certificates.

On November 25, 1959, all of the disputed area involved in this suit was certificated to Delta. The Company was a party to that proceeding, did not appeal from it, and the Commission's order, granting the grandfather cer-

tificate to Delta, became final. Delta has continued since that date to serve every electric customer in the area, including two street lights for the City of Winona. Delta's grandfather certificate from the Commission describes the disputed area involved in this suit by metes and bounds, and clearly covers it.

By an ordinance effective December 31, 1959, the City of Winona extended its corporate limits to the north, south, and to the west. The disputed area here involved is part of the western expansion of the city limits, annexed on that date to the municipal boundaries of Winona.

In May, 1960 the Company without any authorization from the Commission, constructed an electric line into the disputed area, previously certificated by the Commission to Delta, extended it to the Hightower property, and in June, 1960 constructed two prongs from this line in the disputed area for the purpose of serving street lights. No electric service was actually rendered to the Hightower property. The street lights were operated for several weeks, when the bulbs were removed.

On May 31, 1960 Delta filed the present petition before the Commission, asking it to order the Company to remove its line from Delta's area and to cease and desist offering its electric service to service locations within areas certificated to Delta. The Company filed its answer and cross-petitioned. It took the position that extension of the city limits expanded its precedent franchise from the city to cover the newly annexed area.

After a lengthy hearing, the Commission's supplemental and amended order of July 18, 1961 ordered the Company to cease and desist from offering electric service and operating facilities within the disputed area. It denied the cross-petition. The Commission found that

Delta's certificate of November 25, 1959 contained a particular legal description of the area certificated to Delta, which included the disputed area; that the Company did not appeal from the order granting Delta that certificate; that since March 29, 1956 Delta has been rendering reasonably adequate electric service within the disputed area; and the Company's certificate did not include any part of that area certificated to Delta. The Commission stated it did not consider the municipal franchise granted to the Company by Winona to be germane to the issues, and did not pass upon the validity of that franchise. It ruled solely on the respective rights of the parties arising out of their certificates of convenience and necessity.

I.

Prior decisions interpreting the Public Utility Act have established two propositions: (1) Awards by the Commission of grandfather certificates under Section 5 are made on an area rather than a facility basis; (2) A certificate of convenience and necessity issued by the Commission is a valuable right which is entitled to protection by the courts.

An electric power association is under an obligation to render electric service upon a nondiscriminatory basis to its members and to other persons living in the area. Capital Electric Power Assn. v. McGuffee, 226 Miss. 227, 243, 83 So.2d 837, 84 So.2d 793 (1956). A non exclusive franchise is a valuable right which can be protected in the courts. Miss. Power Light Co. v. Miss. Power District, 230 Miss. 594, 611, 93 So.2d 446 (1957); Payne v. Jackson City Lines, Inc., 220 Miss. 180, 70 So.2d 520 (1954).

In Miss. Power & Light Co. v. Town of Coldwater, 234 Miss. 615, 106 So.2d 375 (1958), it was held that a revenue

bond issue, to provide funds for acquisition of electric distribution facilities in a municipality, was void because of defective notice. Whether an electric power association should be permitted to "invade an area" already having electric utility service furnished by the company was first for determination by the Commission. The opinion discussed briefly Section 5 of the Act, recognized the right under Section 5 (b) to a grandfather certificate, and observed that under the second paragraph of Section 5 (d) provision is made for more than one utility operating within a municipality. 234 Miss. at 634.

United Gas Corp. v. City of Philadelphia, 239 Miss. 409, 118 So.2d 618 (1960), is significant. Miss. Code 1942, Sec. 3433, authorized a city to fix utility rates subject to review by the chancery court. Thereafter the Public Utility Act repealed Section 3433, and vested in the Commission the right to determine such rates. In 1946 the city granted United a franchise for 25 years. United proposed to increase its gas rates, and the city obtained an injunction prohibiting it from doing so. Reversing that decree, this Court held that jurisdiction to fix rates was vested by the 1956 Act in the Commission. The city's remedy was said to be before the Commission, and no longer the chancery court. The legislature "reserved the right to pass such laws as may be expedient or necessary in municipal affairs." The 1956 Act superseded pro tanto the precedent franchise to United. The legislature, acting under its police power, had the right to vest in the Commission power to determine rates.

Capital Electric Power Assn. v. Miss. Power & Light Co., 240 Miss. 139, 125 So.2d 739 (1961) (called the Elton case), spelled out in some detail the rights of a holder of a certificate of public convenience and necessity from the Commission. The Elton Company operated a wood-ship-

ping plant three miles south of the City of Jackson. Capital Electric had been serving the area for 17 years, and obtained from the Commission a grandfather certificate under the 1956 Act, which covered the area involved. Nevertheless, Miss. Power & Light Company applied for a certificate to construct lines to Elton, pursuant to its contract with it. The Commission's issuance of a certificate to Mississippi Power was affirmed by the circuit court, but on appeal that judgment was reversed.

Section 5 of the Act was discussed in some detail. Capital Electric was "obligated to render non-discriminatory service to persons living in the area served by it and on the routes traversed by its distribution lines, if they subscribe therefor." Hence it was said that, having served the electric requirements in this area for 17 years, Capital Electric under Section 5(b) acquired the right to a certificate, "being in truth and in fact a franchise from the State. Such right is indeed a valuable one", although nonexclusive. By the Act "it was the intention of the legislature that facilities of one utility should not be duplicated in the same area"; that there should not be "duplication and overriding facilities and certificates." Hence it was said "An existing utility within the certificated area has the right and duty to provide the service, and must be given that opportunity. If it fails, the commission can award another franchise to another utility. Section 5(c) and (f) makes this clear."

For emphasis, it was stated: "There should no longer be any doubt as to the rule in this State on that proposition." The Commission could not disregard the requirements of a grandfather certificate under Section 5(b). In summary, the opinion held: "To allow the invasion of Capital Electric's area on account of the desire of Elton Company, regardless of their reasons therefor, to be served by Mis-

sissippi Power & Light Company would lay down a principle which would result in endle s duplication and make a shamble of the utility act. Such a policy cannot be countenanced by this Court."

Miss. Power Co. v. East Miss. Elec. Power Assn., 140 So.2d 286 (Miss. 1962), involved principally an area within one mile around and adjacent to the City of Louisville. Louisville's Electric System contended that, under Sec. 1H of the Act, it had the sole right and privilege of operating within the one mile corridor. That provision stated that any public utility owned by a municipality should not be subject to the provisions of the Act, excep. as to extensions of utilities greater than one mile outside of corporate boundaries after the effective date. This provision was not a grant, but an exemption from regulation, limited in terms.

East Mississippi had been serving the outside area prior to and on the Act's effective date. It was held the legislature did not intend by this exemption "to take from a company that was operating within said corridor on the date of the Act its right to operate therein," and the Commission was justified in certificating the area to East Mississippi. Whether its certificate could be invaded depended upon whether the Commission found it rendered inadequate service, and failed to remedy it. The award of a certificate, it was held, is made on an area rather than a facility basis. *Capital Electric* so held. Moreover, East Mississippi was a public utility in statutory contemplation. Cf., Miss. Public Service Commission v. Holloway Transfer & Storage Co., No. 42,476, decided January 14, 1963 (Motor Vehicle Act).

In short, prior decisions under the Public Utility Act of 1956 hold that certificates to public utilities are based on an area basis, are valuable rights, although nonexclusive, entitled to protection of the courts, and the Commis-

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sion (under Section 4) has "exclusive original jurisdiction over the intrastate business and property of public utilities." Cf., Miss. Code 1942, Rec., Secs. 5490-5497 (1938 preemption statutes for power assns.)

II.

Prior to the Public Utility Act of 1956, Delta for many years had been serving customers in the disputed area, when it was not within the municipal limits. Before the 1959 expansion of Winona's boundaries, Delta obtained its certificate from the Commission to serve that area. The Company's certificate did not include it. We do not think the Act is susceptible of a construction which would permit subsequent expansion of the city limits to extend the Company's service rights into the disputed territory. If it should, this would permit Company's franchise from the city, executed long before the annexation, when coupled with the expansion order, to supersede the prior grandfather certificate granted by the Commission to Delta for the disputed area. This is not Consistent with the terms of the Act or with the legislative purposes.

The title of Ch. 372, Laws of 1956, states it is an act to "vest authority" in the Commission "to regulate certain public utilities." The preamble reveals legislative concern with utility services "both within and outside of municipalities," and the purpose to vest controlling power in the Commission "to regulate such utilities' rates and services." Section 4 gives it "exclusive original jurisdiction," with certain exceptions. There is no indication that a municipal expansion of boundaries would supersede a prior certificate from the Commission.

Subsection (d) of Section 5 is aimed at the precise issue involved here: "Where there shall be two (2) or more

persons holding certificates of convenience and necessity for similar operation in the same municipality, such operation may be carried on by such persons within their respective certificated areas and such persons shall be exempt from further application to the commission for extension of or additions to their facilities within their respective certificated areas of said municipality, including any extensions of the corporate limits thereof.

"When more than one utility, including co-operatives, operate within a municipality all such utilities, including co-operatives, shall be subject to rate regulation therein. . . ."

Subsection (d) recognizes that two public utilities, such as Delta and Company, may hold certificates for similar operations in the same municipality. It authorizes operations to be carried on by them "within their respective certificated areas," and exempts them from further application for extension of their facilities within their "respective certificated areas of said municipality, including any extensions of the corporate limits thereof." In other words if such utilities extend or add to their facilities within their respective certificated areas of the city, which would include extensions of corporate limits of the city, they are exempt from further application to the Commission for such extensions or additions. This assumes the annexed areas are within the respective certificated areas of the two utilities.

The second paragraph of subsection (d) recognizes that both "co-operatives" and other utilities may operate within a municipality at the same time, and in such event they are subject to rate regulation. In short, subsection (d) specifically applies to and recognizes the existence of a situation such as that here presented, where Delta and the

Company have respective certificated areas in the municipality, under the extension of the city limits. Section 5 (d) applies to certificate holders for areas subsequently annexed to municipalities. This is evidenced from the phrase, "including any extensions of the corporate limits thereof."

Subsections (b), (c), and (d), of Section 5, must be read together. Subsection (b), mandatory in nature, requires the Commission to issue a grandfather certificate where a person, as defined, is engaged in the operation of facilities on the effective date of the Act, March 29, 1956. Subsection (c) provides that "in all other cases" the Commission shall have a hearing on certificate applications, "provided, however, no certificate shall be required for extensions or additions within the corporate limits of a municipality *being served by the holder of a certificate of convenience and necessity*, . . ." (emphasis supplied) Hence if there is only one holder of a certificate within a municipality, then it can construct extensions anywhere in the corporate limits without further application to the Commission. However, under subsection (d), where there are two holders of certificates in the same municipality, then each holder is only exempt from further application to the Commission for extensions *within its own certificated area* of the municipality.

The quoted part of subsection (c), upon which Company relies, must be considered along with subsection (d). When read together, the foregoing interpretation renders both subsections consistent with one another, the terms of the statute, and a reasonable exercise of legislative discretion. Accordingly, under subsection (d), when there were two persons holding valid certificates for electric operations in separate areas in Winona, as extended, these certificate holders had the right to carry on their operations in their respective certificated areas within the

municipality, without making further application to the Commission for extensions and additions of their facilities, within their respective certificated areas.

The reference in subsection (d) to "respective certificated areas" reflects a legislative intent to exempt the holder of a certificate, and not the holder of a municipal franchise. Throughout Section 5, the statute uses the words "certificate" and "franchise" correctly and distinctly. If the legislature had intended to exempt the holder of a municipal franchise, then it would have used the term "municipal franchise" instead of the word "certificate." When it referred to extensions "within their respective certificated areas," it intended areas which had been certificated by the Commission, not areas for which a municipal franchise only had been issued. If it had intended the latter, it would have said so.

Furthermore, subsection (b) made it mandatory for the Commission to issue a certificate to Delta for the areas it was serving outside the then corporate limits of Winona. The legislature knew that corporate limits sometimes expand. If it had intended the Commission should not issue certificates for areas near corporate limits, in view of possible future expansions, then presumably it would have so stated, and not used the mandatory language of subsection (b).

The phrase "municipal franchises" is used numerous times in Section 5. Yet it does not provide that when a certificated area is taken within a municipality, the Commssion's certificate would be cancelled. The clear inference is that the legislature did not intend that result. Moreover, there is no provision that, after a certificate has been issued by the Commission, it shall be necessary, after

corporate limits are extended, for a municipal franchise also to be obtained.

Nor is there any direction that a municipal expansion shall cancel or in any way affect a Commission certificate. The exclusive method for cancellation of such a certificate is prescribed in subsection (f), Section 5, where a utility is not rendering reasonably adequate service, and fails to do so after ordered to correct it. Yet Company's argument would add an additional ground for cancellation of a Commission certificate, namely, where a municipality has extended its corporate limits into a previously certificated area. The statutory expression of one method for cancellation of certificates is justly to be construed as an exclusion of other methods. 50 Am. Jur., Statutes, Secs. 244-46; Tepper Bros. v. Buttross, 178 Miss. 659, 664, 174 So. 556 (1937).

The next to last sentence of subsection (e) contemplates power associations operating within a city and paying for that privilege. It says that any co-operative operating "within *any area* of a municipality" shall pay it two percent of gross revenue from inside sales. Furthermore, the first sentence of Section 5 provides that no person shall construct, acquire or operate equipment for distribution of electricity "without first having obtained from the Commission a certificate." There is no exception which would authorize a municipality, by issuing a franchise, to excuse this requirement of a certificate.

Subsection (e) recognizes that a public utility, which holds "a certificate of convenience and necessity granted under the provisions of this act covering the geographical area of such municipality," may after the expiration of a "municipal franchise" continue to use the streets upon condition of payment of compensation therefor at the rate of

two percent of sales to customers within the city. Nevertheless, the utility must have a certificate from the Commission.

Subsection (g) of Section 5, upon which Company particularly relies, has a restricted application. It constitutes a limitation on the Commission, as of the time of issuing a certificate, for an area which at that time is in a municipality. It prohibits the Commission from issuing to a utility a certificate for an area *then* in a municipality, unless the utility has a franchise from the municipality. It presupposes the pending application is for a certificate. Here Delta is not seeking a certificate for any service territory. It already has a valid certificate covering the disputed tract, granted to it by the Commission before the expansion of the city limits, and at a time when no part of the area was within the corporate limits.

Subsection (g) also presupposes that an applicant for a certificate within a municipality has a municipal franchise, which it must attach to its application. Moreover, it does not require that any further application be filed after a certificate is once granted by the Commission. This construction is further supported by the third sentence of subsection (g). It states that if a municipality arbitrarily refuses to grant a franchise to a utility "now operating within said municipality," then the utility can obtain a Commission certificate for a municipal area without having a franchise. See Miss. Valley Gas Co. v. City of Jackson, 236 Miss. 81, 109 So. 2d 637 (1959). The phrase "now operating" refers to the effective date of the Act, March 29, 1956. No similar relief was provided for a utility holding a certificate for an area outside of a municipality, which is taken into it after that date, and the franchise arbitrarily is denied. This omission warrants the conclu-

sion the legislature intended that, when a certificate was once validly granted, (as it was to Delta), it would remain valid even though the area was subsequently annexed by a municipality; and that such annexation would not make it necessary for the utility to apply again for the area already certified to it. If that were not so, the legislature as a matter of equality would have afforded presumably the same relief from arbitrariness to a utility whose certificated area was brought into a city by a municipal expansion.

III.

In the drafting of Section 5 of the Act, the legislature was aware manifestly of municipal franchises, Commission certificates, and extensions of corporate limits. It mentioned all of them in the Act. If it had intended that extension of municipal limits would cancel, modify, or affect in any way a certificate of convenience and necessity from the Commission, it no doubt would have provided for such cancellation. There is no such directive. To read into the Act a requirement that any extension of municipal limits would cancel *pro tanto* a certificate from the Commission would be unwarranted.

Moreover, it would impute to the legislature an intent inconsistent with its purpose to avoid duplicating facilities. The dominant policy which the legislature had in view must be considered. See Zeigler v. Zeigler, 174 Miss. 302, 310, 164 So. 768 (1935); Sheffield v. Reece, 201 Miss. 133, 143, 28 So.2d 745 (1947); Gambrill v. Gulf States Creosoting Co., 216 Miss. 505, 510-511, 62 So. 2d 772 (1953). This maintains the *status quo* in the disputed area.

Subsection (d) authorizes two electric utilities to serve separate certificated areas in the same municipality. This would result in no duplication or inconvenience, the legis-

lature apparently concluded, although the contrary might well be the case where two transit companies are serving in one city. At any rate, subsection (d) of Section 5 makes it clear that two utilities may hold certificates from the Commission for separate areas in the same municipality. The legislative history in the Senate, as reflected in the Journal, is too sketchy and indefinite to be of assistance in the Act's interpretation on the present issues. Miss. Senate Journal, 1956, pp. 327, 329, 353-359, 391, 405-408, 510, 540-542, 575. Moreover, the statute as finally enacted is the controlling guide.

A municipality in Mississippi is a creature of the State. It has only such power and authority as may be granted to it by statute. Adams v. Kuykendall, 83 Miss. 571, 590, 35 So. 830 (1903). The powers given municipalities to grant utility franchise and the right to use their streets and public places are subject to legislative control. Miss. Code 1942, Rec., Secs. 3374-73, 3374-85, 3374-119, 3374-120, 3374-129. The same applies to the power to extend municipal boundaries. Code Secs. 3374-10 to 3374-16. Code Sec. 2780 gives power associations the privilege to construct their lines over public roads and lands, subject to regulation.

All of these statutes must be read together, and in the light of the subsequently enacted Public Utility Act of 1956. To the extent that the latter statute is inconsistent with any of the former's provisions, the Act modifies them. All were enacted under the police power of the state. Superior Oil Co. v. Foote, 214 Miss. 857, 59 So. 2d (1952). We do not consider or decide any issues unnecessary for the decision of this case. We hold that expansion of the city limits of Winona into the disputed area, coupled with the franchise and street lighting contract from Winona to

Company, did not supersede Delta's certificate from the Commission to serve the disputed area. That certificate was issued before the area was within the municipal limits. The city at that time did not have any jurisdiction or power over this territory. Its franchise and street lighting contract, at the time of their execution, could not preclude the legislature from exercising its plenary police power over areas then outside of municipalities, nor its power to control and regulate municipal activities.

Municipal ordinances are necessarily local in their application. They apply only to the territory of the municipality by which they were enacted. They have no extraterritorial application, except when the sovereign gives them that effect. Anno., 13 Am. & Eng. Ann. Cas. 136 (1909).

A municipality's power over its streets is derived from the state, which has plenary control over them, including the right to grant the use of streets to others. So. Bell Tel. & Tel. Co. v. Meridian, 241 Miss. 678, 131 So. 2d 666 (1961). Code Sec. 2780 granted that right to Delta in the disputed area long before the annexation. After that event, the governing body of a municipality has the right to regulate reasonably the manner in which Delta's lines and appliances are constructed and maintained, subject to the original, primary jurisdiction of the Commission over all services and facilities of public utilities under the 1956 Act.

IV.

Appellees contend that to deny extension of the corporate franchise and street lighting contract to the disputed area would violate the impairment of contracts and due process clauses of both the State and Federal Constitutions. Miss. Const. 1890, Secs. 14, 16; U.S. Const., Art. I, Sec.

10, par. 1; 14th Amend. We find no merit in this position. It is based on the assumption that the franchise and street lighting contract, which were granted Company by Winona when the disputed area was not within the corporate limits, vested in Company rights in that area, which was then outside of municipal limits. When they were executed by the city, no statute of this state authorized Winona to grant a franchise or street lighting contract to the disputed area, then outside the city. Winona's power was confined to its corporate limits. The city had no extraterritorial power of any kind to grant Company any rights in the disputed area when the contracts were executed.

On the effective date of the Public Utility Act, and before the disputed area came within municipal limits, the legislature by that Act vested in Delta a right to receive for it a grandfather certificate. This was a valid exercise of the police power of the state. The municipal franchise and street lighting contract were not pre-existing rights as to the area involved in this suit, because before they could attach, if at all, the certificate issued to Delta by the Commission under the Act attached to the disputed area. There is no constitutional objection to this interpretation. On the contrary, to deprive Delta of the disputed area as a service territory would not only be contrary to the mandatory terms of the statute, but would also be violative of the certificate granted to it by the Commission. See Miss. Laws 1956, Ch. 372, Sec. 26 (d) (scope of review).

There was no error in the Commission's overruling Company's plea to its jurisdiction, and the motion to dismiss Delta's petition. Appellant did not seek any relief against the City of Winona. It only sought an order directing Company to remove its lines in the disputed area, relying upon its certificate from the Commission. Hence

the city was not a necessary party to the suit. Moreover, at Company's instance, the Commission struck from Delta's pleading allegations attacking validity of the franchise, and properly ruled that it had no power to pass upon that issue.

Stegall v. City of Jackson, 141 So. 2d 236, 143 So. 2d 298 (Miss. 1962), does not affect this case. It held only that land developers who, without authority, laid sewer lines in streets and county roads, without any recorded reservation, dedicated that system to the public use, and could not recover its value from the city which annexed the area. However, *Stegall* (141 So. 2d at 241) referred to Gwin v. City of Greenwood, 150 Miss. 656, 115 So. 890, 58 A.L.R. 849 (1928), which has some relevancy here. There the owner of a subdivision outside of the city limits dedicated the streets, but reserved the exclusive right to operate water and sewer lines thereon. Later the city extended its boundaries to include this area. It was held the municipality had no right to enjoin Gwin from interfering with its extension of water mains. The reservation in the dedication reserved in the dedicator a private right of property, when the reservation was made before the area was brought into the city limits.

Appellees argue as analogous precedents from other states several cases in which municipalities have extended their boundaries, affecting previously acquired utility rights in the annexed area. Farmers Electric Co-op. Corp. v. Ark. Power & Light Co., 220 Ark. 652, 249 S.W.2d 837 (1952), but changed by Ark. Laws 1955, Act. No. 85, and Ark. Laws 1957, Act. No. 103; Wichita Falls v. Bowen, 143 Tex. 45, 182 S.W.2d 695 (1944); Omaha Transit Co. v. Briggs, 167 Neb. 703; 94 N.W.2d 461, 28 PUR 3d 26 (1959); Whitaker v. Louisville Transit Co., 274 S.W.2d 391 (Ky.

1954); Rosehill Cemetery Co. v. Chicago, 352 Ill. 11, 185 N.E. 170 (1933); Deneen v. Houghton Co. St.-Ry. Co., 150 Mich. 235, 113 N.W. 1126, 13 Am. & Eng. Ann. Cas. 134 (1907); Public Service Co. v. Public Utility Comm. of Colo., 142 Colo. 135, 350 P.2d 543 (1960); Clarke-Washington Elec. Membership Corp. v. Ala. Power Co., 272 Ala. 598, 133 So. 2d 488 (1961). These cases are not persuasive here. They are based essentially upon the particular statutes and constitutional provisions of the specific states. They involve issues and statutes different from those arising under the Public Utility Act of 1956.

In summary, on the direct appeal by Delta, the judgment of the chancery court, which reversed and set aside the order of the Public Service Commission, is reversed. The order of the Commission is reinstated and affirmed. Appellees' cross appeal on the jurisdictional issue is without merit. Hence on the cross appeal the case is affirmed.

ON DIRECT APPEAL, REVERSED AND ORDER OF PUBLIC SERVICE COMMISSION REINSTATED AND AFFIRMED: ON CROSS APPEAL, AFFIRMED.

ALL JUSTICES CONCUR.

APPENDIX 3

Sections 1, 4, 5, 6, 22, 26 and 28 of Chapter 372, *Mississippi Laws of 1956* (Sections 7716-01, 7716-04, 7716-05, 7716-06, 7716-22, 7716-26 and 7716-28, Volume 6 Recompiled, *Mississippi Code of 1942*)

Section 1. *Definitions.* A. The term "corporation," when used in this act, includes a private or public corporation, a municipality, an association, a joint stock association or a business trust.

B. The term "person," when used in this act, includes a natural person, a partnership of two (2) or more persons having a joint or common interest, a co-operative, non-profit, limited dividend or mutual association, a corporation as hereinbefore defined, or any other legal entity.

C. The term "municipality," when used in this act, includes any incorporated city, town or village.

D. The term "public utility," when used in this act, includes persons and corporations, or their lessees, trustees and receivers now or hereafter owning or operating in this state equipment or facilities for:

(1) The generation, manufacture, transmission or distribution of electricity to or for the public for compensation.

(2) The transmission, sale, sale for resale, or distribution of natural, artificial, or mixed natural and artificial gas to the public for compensation by means of transportation, transmission, or distribution facilities and equipment located within this state, but shall not include the production and gathering of natural gas, the sale of natural gas in or within the vicinity of the field where produced, nor the distribution or sale of liquefied petroleum gas.

(3) The transmission, conveyance or reception of any message over wire, or by radio, or otherwise, of writing, signs, signals, pictures and sounds of all kinds by or for the public, where such service is offered to the public for compensation; and the furnishing, or the furnishing and maintenance, of equipment or facilities to the public, for compensation, for use as a private communications system or part thereof; provided, that no persons or corporations not otherwise a public utility within the meaning of this act shall be deemed such solely because of engaging in this

state in the furnishing, for private use as last aforementioned; and provided further that nothing in this act shall be construed to apply to television stations, radio stations or community television antenna services.

(4) The transmission, distribution, sale or resale of water to the public for compensation.

(5) The term "public utility" shall not include any person not otherwise a public utility, who furnishes the services or commodity described in sections 1 D (1), 1 D (2), 1 D (3) and 1 D (4) of this act only to himself, his employees or tenants as an incident of such employee service or tenancy, and provided such services are not sold or resold to such tenants or employees on a metered or consumption basis.

E. The term "rate," when used in this act, means and includes every compensation, charge, fare, toll, rental and classification, or any of them, demanded, observed, charged or collected by any public utility for any service, product or commodity described in this section, offered by it to the public, and any rules, regulations, practices or contracts relating to any such compensation, charge, fare, toll, rental or classification; except, however, the term "rate" shall not include charges for electrical current furnished, delivered or sold by one public utility to another for resale.

F. A public utility's business other than of the character defined in subparagraphs (1) to (4) of subsection D of this section is not subject to the provisions of this act.

G. The word "commission," when used in this act, shall refer to the Public Service Commission of the State of Mississippi as now existing, unless otherwise indicated.

H. Any public utility as defined in paragraph D above, owned or operated by a municipality shall not be subject

to the provisions of this act, except as to extension of utilities greater than one mile outside of corporate boundaries after the effective date of this act.

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Section 4. *General jurisdiction and powers.*—Subject to the limitations imposed in this act, and in accordance with the provisions hereof the commission shall have exclusive original jurisdiction over the intrastate business and property of public utilities as herein defined, except and provided, however, that the commission shall not have jurisdiction over the production and gathering of natural gas, or the sale of natural gas in or within the vicinity of the field where produced, nor over the facilities and equipment utilized in any such operations including but not limited to such facilities as separators, scrubbers, and gasoline plants of all types. Provided, further, the commission shall not have jurisdiction to regulate the rates for the following sale of commodities or services: (1) sales of gas, water or electricity by municipalities to such persons as said municipalities are authorized by law to serve; (2) sales of gas or electricity by co-operative gas or electric power associations to the members thereof as consumers, except as provided by section 5, paragraphs (d) and (e) where service is rendered in a municipality.

Section 5. *Certificate of public convenience and necessity: when required.*—No person shall construct, acquire, extend or operate equipment for manufacture, mixing, generating, transmitting or distributing natural or manufactured gas, or mixed gas, or electricity, or water, for any intrastate sale, to or for the public for compensation, or for the operation of a public utility operating a business and equipment or facilities as contemplated by subsection D (3) of section 1, of this act, without first having obtained from the commission a certificate that the

present or future public convenience and necessity require or will require the operation of such equipment or facility.

(a) Provided, however, nothing herein shall be construed to require any certificate of convenience and necessity from the commission for the production and gathering of natural gas, the sale of natural gas in or within the vicinity of the field where produced, the distribution or sale of liquefied petroleum gas, or for the facilities and equipment utilized in any such operations.

(b) The commission shall issue a certificate of convenience and necessity to any person engaged in the construction or operation of such equipment or facility on the effective date of this act, for the construction or operation then being conducted, without requiring proof that public convenience and necessity will be served by such construction or operation, and without further proceedings, if application for such certificate is made to the commission within six (6) months after the effective date of this act; and pending the filing of any such application and the issuance of a certificate, the continuance of such construction or operation shall be lawful. Any utility covered by this act which has heretofore been under the jurisdiction of the Mississippi Public Service Commission shall, upon application within six (6) months of the effective date of this act, be issued a certificate authorizing it to conduct operations and make extensions within any area covered by its service area map or maps on file with the Mississippi Public Service Commission on the effective date of this act.

(c) In all other cases the commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the commission; provided, however, no

certificate shall be required for extensions or additions within the corporate limits of a municipality being served by the holder of a certificate of convenience and necessity, and provided further, that the commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section: (1) temporary acts or operations for which the issuance of a certificate will not be required in the public interest; and (2) extensions or additions of service facilities outside of municipalities under such general rules as will promote the prompt availability of such service to prospective users, and at the same time prevent unnecessary and uneconomic duplication of such facilities as between two (2) or more persons.

(d) Where there shall be two (2) or more persons holding certificates of convenience and necessity for similar operation in the same municipality, such operation may be carried on by such persons within their respective certificated areas and such persons shall be exempt from further application to the commission for extension of or additions to their factilities within their respective certificated areas of said municipality, including any extensions of the corporate limits thereof.

When more than one utility, including co-operatives, operate within a municipality all such utilities, including co-operatives, shall be subject to rate regulation therein. Provided, further, that municipally operated utilities shall not be subject to regulation under this act.

(e) In addition to such other rights as it may have to use the streets, alleys and public places of a municipality, a public utility which holds a certificate of public conven-

ience and necessity granted under the provisions of this act covering the geographical area of such municipality, and which (1) is operating under a municipal franchise on the effective date of this act, or (2) shall have previously operated under such a municipal franchise which has expired within five (5) years prior to the effective date of this act, or (3) which shall hereafter operate under a municipal franchise hereafter granted, may, after the expiration of any such franchise continue to use the streets, alleys and public places therein situated upon condition that (1) such utility shall pay the said municipality compensation therefor at the rate of two per cent (2%) of said utility's gross revenues from sales to residential and commercial customers within said municipality, in case of a utility defined in section 1 D (1) and 1 D (2) and in the case of a utility defined in 1 D (3) the said utility shall pay two per cent (2%) of the monthly service charges in said municipality whether said utility has a franchise to operate therein or not, such payments to be made quarterly of each year after the effective date of this act, and (2) that after the expiration of such franchise the municipality, or any customer of such utility in such municipality, upon appropriate petition, shall be entitled to a hearing as to whether or not the certificate of convenience and necessity may then and thereafter be granted on a permanent basis as herein set out. Any co-operative which shall operate within any area of a municipality shall likewise pay such municipality two per cent (2%) of the co-operative's gross revenue from sales to residential and commercial customers within said municipality. Any municipality shall have the right to acquire by purchase, negotiation or condemnation the facilities of any utility that is now or may hereafter be located within the corporate limits of such municipality.

(f) The commission may, after a hearing had upon due notice, make such findings as may be supported by proof as to whether any utility holding a certificate under the provisions of this act is rendering reasonably adequate service in any area covered by such utility's certificate, and in the event the commission finds that such utility is not rendering reasonably adequate service the commission may enter an order specifying in what particulars such utility has failed to render reasonably adequate service and order that such failure be corrected within a reasonable time, such time to be fixed in such order. If the utility so ordered to correct such failure fails to comply with such order of the commission and the commission finds that cancellation of its certificate would be in the best interest of the consuming public served by the holder of the certificate, its certificate for the area affected, may be revoked and cancelled by the commission.

(g) Notwithstanding any provision herein to the contrary, in any case where a utility is located and operates, or proposed to locate and operate in a municipality where streets and other public places are essential to such location and operation, no certificate of convenience and necessity shall be issued thereasto without prior franchise granted by the municipality; provided however, such franchise shall not contain any provision conflicting with or repugnant to the exclusive jurisdiction of the commission to regulate rates and services of the utilities as herein provided. Applicants for certificates of convenience and necessity as provided for under section 5 hereof shall attach to their applications true and correct copies of franchises issued to them by such municipality as the application may embrace, and the commission is authorized so to amend such franchises as to exclude and remove therefrom any provision in conflict with or repugnant to the exclusive

jurisdiction of the commission over rates and services and which shall in any way fix or affect rates. Provided, however, should any municipality arbitrarily refuse to grant a franchise or provide for an election for a franchise as provided by law to a utility now operating within said municipality within ninety (90) days after application for said franchise is made, then the utility may obtain a certificate of convenience and necessity without the necessity of first obtaining a franchise; and the said commission shall so issue said certificate of convenience and necessity upon proper showing by the utility that said franchise is being arbitrarily withheld.

In the event the commission shall rule that a franchise is being arbitrarily withheld and shall issue a certificate of necessity as hereinabove mentioned, the utility obtaining said certificate of convenience and necessity shall not be required to pay to said municipality the two per cent (2%) hereinabove provided until such a franchise has been granted to said utility.

In the case of a public utility as defined in section 1 D (3) which has heretofore been under the jurisdiction of the Mississippi Public Service Commission and has its service area maps on file with the commission on the effective date of this act, under such reasonable rules and regulations as the commission shall prescribe, the commission is authorized to issue to such utility a certificate of convenience and necessity without requiring such utility to first obtain a municipal franchise as herein provided.

Section 6. *Extension of service.*—The commission may, after hearing, upon notice, by order in writing, require every public utility to establish, construct, maintain and operate any reasonable extension of its existing facilities within the certificated area upon findings and order that

such extension is reasonable and practicable, and provided further, that in the case of gas and water a sufficient supply is available and obtainable therefor.

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Section 22. *Decision.*—After the conclusion of a hearing, the commission shall make and file its findings and order, and its opinion, if any. All findings shall be supported by substantial evidence presented in the hearing and shall be in sufficient detail to enable the court on appeal to determine the controverted questions presented by the proceeding, and the basis of the commission's conclusion. A copy of such order certified under the seal of the commission, shall be served upon the person against whom it runs, or his attorney; and notice thereof shall be given to the other parties to the proceedings or their attorneys. Said order shall take effect twenty (20) days after the service thereof, unless otherwise provided, and shall continue in force, either for a period which may be designated therein or until changed or revoked by the commission. If an order cannot, in the judgment of the commission, be complied with within twenty (20) days, the commission may grant and prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may, on application and for good cause shown, extend the time for compliance fixed in its order.

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Section 26. *Review.*—(a) In addition to other remedies now available at law or in equity any party aggrieved by any final finding, order, or judgment of the commission, shall have the right, regardless of the amount involved, of appeal to the Chancery Court, First Judicial District of Hinds County, Mississippi. If an application for rehearing has been filed, an appeal must be filed within thirty (30) days after the application for rehearing has

been refused or deemed refused because of the commission's failure to act thereon within the time specified in the preceding section or, if the application is granted, within thirty (30) days after the rendition of the decision on rehearing. If an application for rehearing has not been filed, an appeal must be filed within thirty (30) days after the entry of the commission's order. Every appeal shall state briefly the nature of the proceedings before the commission, and shall specify the order complained of. Any person whose rights may be directly affected by said appeal may appear and become a party, or the court may upon proper notice order any person to be joined as a party.

(b) Upon the filing of an appeal the clerk of the chancery court shall serve notice thereof upon the commission, whereupon the commission shall, within sixty (60) days (or within such additional time as the court may for cause allow) from the service of such notice, certify to the chancery court the record in the case, which record shall include a transcript of all testimony, together with all exhibits or copies thereof, all pleadings, proceedings, orders, findings and opinions entered in the case; provided however, that the parties and the commission may stipulate that a specified portion only of the record shall be certified to the court as the record on appeal.

(c) No new or additional evidence shall be introduced in the chancery court but the case shall be determined upon the record and evidence transferred.

(d) The court may hear and dispose of the appeal in term time or vacation and the court may sustain or dismiss the appeal, modify or vacate the order complained of in whole or in part, as the case may be; but in case the order is wholly or partly vacated the court may also, in its discretion, remand the matter to the commission for such further proceedings, not inconsistent with the court's or-

der as, in the opinion of the court, justice may require. The order shall not be vacated or set aside either in whole or in part, except for errors of law, unless the court finds that the order of the commission is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the commission, or violates constitutional rights.

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Section 28. *Appeals.*—Appeals in accordance with law may be had to the Supreme Court of the State of Mississippi from any final judgment of the chancery court.

If the party taking the appeal has theretofore furnished security as provided in section 27 of this act, or, in the case of an appeal from a judgment involving an order of the commission affecting rates, has filed a bond conditioned as provided in section 10 or section 27, the taking of an appeal to the Supreme Court shall operate as a supersedeas without the furnishing of further security or bond, provided, that in such cases the Supreme Court may, upon application to it, require such additional security, or such additional bond conditioned as provided in section 10 or section 27, as in its opinion will adequately secure the other party to the appeal, or parties who may become entitled to refunds, against loss in the event the judgment under review is affirmed.